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No. 96-1498

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1996

SCIOTO COUNTY REGIONAL WATER
DIST. NO. 1, AUTHORITY
Petitioner

v.

SCIOTO WATER, INC., ET AL
Respondents

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

OPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Bell Arthur Water Corporation ***("Bell Arthur")***, Eastern Pines Water Corp. ***("Eastern Pines")***, North Alamo Water Supply Corporation ***("North Alamo")***, Bear Creek Water Association, Inc. ***("Bear Creek")***, Rural Water System #1 ***("RWS")***, Mississippi Rural Water Association ***("MRWA")***, Oklahoma Rural Water Association ***("ORWA")*** and North Carolina Rural Water Association ***("NCRWA")*** (hereinafter, jointly referred to as ***"Movants")*** hereby request leave to file an amicus curiae brief in support of Petitioner, Scioto County Regional Water District No. 1, Authority ***("Water 1")***, and in support of their request respectfully show the following:

1. Movants are or represent utilities indebted to the federal government, who have asserted or are interested in asserting the protections of 7 U.S.C. Section 1926(b) ***("Section 1926(b)")***.

2. Bell Arthur is a nonprofit water supply corporation serving a population of approximately 11,200 persons in Pitt County, North Carolina. Bell Arthur has financed the construction and operation of its water system through a series of loans and grants from the Farmer's Home Administration ***("FmHA")***. The present sum of these FmHA loans and grants total in excess of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000.00). In 1988, Bell Arthur purchased its notes from the FmHA under the purchase program promulgated by the United States Department of Agriculture ***("USDA")*** pursuant to Section 1001(f) of the Omnibus Budget Reconciliation Act of 1986 ***("OBRA")***. Bell Arthur is also a party in Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2), currently pending in the U.S. District Court for the Eastern District of North Carolina, which involves the same question presented in this case. Bell Arthur may lose over one-third of its customer base in the event that the protections of Section 1926(b) do not extend to purchase program participants.

3. Eastern Pines is a nonprofit water supply corporation providing water to approximately 22,000 households in Pitt County, North Carolina. Eastern Pines also participated in the Section 1001(f) purchase program. The potential financial loss to Eastern Pines should Section 1926(b) protection not extend to purchase program participants could be in excess of Ten Million Dollars ($10,000,000.00).

4. North Alamo is a nonprofit water supply corporation providing potable water to areas of Hidalgo County, Texas. Bear Creek is a nonprofit water supply corporation which provides water service to rural residents of Mississippi. North Alamo and Bear Creek are presently indebted to FmHA. North Alamo and Bear Creek have each previously been a party to Section 1926(b) litigation. *See*, North Alamo Water Supply Corporation v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), *cert. denied* (U.S. Dec. 9, 1996) (No. 96-668); City of Madison, Miss. v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987). Both North Alamo and Bear Creek are particularly interested in the outcome of this litigation because the FmHA is presently implementing purchase programs whereby qualified indebted associations, such as North Alamo and Bear Creek, would be compelled to retire their FmHA debt. Loss of Section 1926(b) protection to North Alamo and Bear Creek under such circumstances could result in losses in excess of Twenty Million Dollars ($20,000,000.00).

5. RWS is a nonprofit water supply corporation presently serving over 1,100 rural residential households primarily in Sioux County, Iowa. In 1988, RWS participated in the Section 1001(f) purchase program and is a party in Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB, currently pending in the U.S. District Court for the Northern District of Iowa, litigating the same question presented in this case. RWS is presently indebted to FmHA and has pledged its entire water delivery system as collateral for said FmHA loan. In the event that the protections of Section 1926(b) do not extend to purchase program participants, the ability of RWS to repay its FmHA debt is substantially threatened.

6. NCRWA, MRWA, and ORWA are nonprofit associations comprised of rural water utilities formed for the purpose of advancing the interests of these utilities. NCRWA, MRWA and ORWA together represent in excess of 1,600 active member utilities who serve approximately 2.3 million customers throughout the states of North Carolina, Mississippi and Oklahoma. Most of the members of NCRWA, MRWA and ORWA have financed their operations through FmHA loans and grants. Many of their members have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. Potential losses to NCRWA, MRWA and ORWA members in the event Section 1926(b) protection is denied to these program participants are substantial. Losses to members of NCRWA and ORWA, alone, could easily exceed One Hundred Thirty Million Dollars ($130,000,000.00).

7. As set forth in their Brief, Movants believe that the Sixth Circuit Court's interpretation and application of OBRA Section 1001(f) is inconsistent with the prior rulings of this Court and is in direct conflict with the decision of the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservacy District, 900 P.2d 81 (Colo. 1995). The decision below severely jeopardizes the ability of Section 1001(f) program participants, such as Amicus, Bell Arthur, Eastern Pines and RWS, and members of Amicus, NCRWA, MRWA and ORWA, to repay their debt and to remain financially viable. Thus, Movants are affected, or potentially affected, by this Court's decision respecting the Sixth Circuit's ruling. The interests of Movants are not remote but are very much related to the specific issues in this case. It is appropriate and desirable, and Movants believe it will be a benefit to this Court, that Movants be

granted permission to file this amicus curiae brief to address certain issues raised in this case. Movants' brief is submitted with this Motion pursuant to S.Ct.R. 37(2)(b).

8. After consultation with same, Steven L. Mowery, counsel for Respondent, Scioto Water, Inc., and James Coombe, counsel for Respondent, U.S.D.A. have withheld their consent to the filing of Movants' Brief as amicus curiae, and Ralph Tarr, counsel for Petitioner, Water 1, Authority, has consented to the filing of Movants' Brief as amicus curiae.

WHEREFORE, PREMISES CONSIDERED, Movants respectfully request that they be given leave to file their amicus brief in support of Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amici are Bell Arthur Water Corporation, Eastern Pines Water Corp., North Alamo Water Supply Corporation, Bear Creek Water Association, Inc., Rural Water System #1, Mississippi Rural Water Association, Oklahoma Rural Water Association and North Carolina Rural Water Association.

Bell Arthur Water Corporation ***("Bell Arthur")*** is a nonprofit water supply corporation serving a population of approximately 11,200 persons in the southwestern portion of Pitt County, North Carolina. Bell Arthur's service area is comprised of approximately 71,195 acres. Bell Arthur has financed the construction and operation of its water system through a series of loans and grants from the Farmer's Home Administration ***("FmHA")***. The sum of these FmHA loans and grants total in excess of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000.00).

Bell Arthur's FmHA notes were selected for sale under Section 1001(f) of the Omnibus Budget Reconciliation Act of 1986 ***("OBRA")***, as amended by the Agricultural Credit Act of 1987 ***("ACA")***. In 1988, Bell Arthur exercised its right of first refusal under OBRA Section 1001(f) and purchased its notes from FmHA under the purchase program promulgated by the United States Department of Agriculture ***("USDA")***, pursuant to OBRA Section 1001(f) ***("Section 1001(f) purchase program")***.

Bell Arthur is also a party in Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2), currently pending in the U.S. District Court for the Eastern District of North Carolina, which

involves the same question presented in this case.

Bell Arthur could potentially suffer a loss of thirty-eight (38%) percent of its customer base in the event that the protections of 7 U.S.C. §1926(b) ***("Section 1926(b)")*** do not extend to purchase program participants. The loss of these customers threatens the solvency of Bell Arthur and its ability to continue to operate and provide water service to its customers. At the very minimum, denial of Section 1926(b) protections under these circumstances would result in extreme increases in water rates to its remaining customers, affecting thousands of North Carolina households.

Eastern Pines Water Corporation ***("Eastern Pines")*** is a nonprofit water supply corporation formed to provide water to residents in Pitt County, North Carolina. Eastern Pines has a service area of approximately 121,787 acres and serves approximately 22,000 households. Eastern Pines has previously financed the construction and operation of its water system with FmHA loans and grants and also participated in the Section 1001(f) purchase program. The potential financial loss to Eastern Pines should Section 1926(b) protection not extend to purchase program participants could be in excess of Ten Million Dollars ($10,000,000.00).

North Alamo Water Supply Corporation ***("North Alamo")*** is a nonprofit water supply corporation formed to provide potable water to areas of Hidalgo County, Texas. North Alamo has financed the construction and operation of its water system with loans and grants from the FmHA. The sum of these FmHA loans and grants presently total in excess of Eleven Million Dollars ($11,000,000.00).

Bear Creek Water Association, Inc. ***("Bear Creek")*** is a nonprofit water supply corporation which provides water service to rural residents of Mississippi. Bear Creek has also financed the construction and operation of its water system with loans and grants from the FmHA and is presently indebted to FmHA.

Both North Alamo and Bear Creek have previously been a party to Section 1926(b) litigation. *See*, North Alamo Water Supply Corporation v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), *cert. denied* (U.S. Dec. 9, 1996) (No. 96-668); City of Madison, Miss. v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987). North Alamo and Bear Creek are particularly interested in the outcome of this litigation because the FmHA is presently implementing purchase programs whereby qualified indebted associations, such as North Alamo and Bear Creek, would be compelled to retire their FmHA debt. Loss of Section 1926(b) protection to North Alamo and Bear Creek under such circumstances could result in losses in excess of Twenty Million Dollars ($20,000,000.00).

Rural Water System #1 ***("RWS")*** is a nonprofit water supply corporation serving approximately 1,100 rural residential households primarily in Sioux County, Iowa. RWS has financed the construction and operation of its water system through a series of loans and grants from the FmHA. The sum of RWS's outstanding FmHA loans and grants presently total in excess of Three Million Dollars ($3,000,000.00). RWS has pledged its entire water delivery system as collateral for its FmHA loans.

RWS is a party in Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB

(N.D.W.D.IA.), currently pending in the U.S. District Court for the Northern District, Western Division of Iowa, wherein the same question presented in this case is being litigated.

RWS relies on Section 1926(b) protection to maintain its customer base and ability to repay its FmHA debts. In the event that the protections of Section 1926(b) do not extend to purchase program participants, the ability of RWS to repay its FmHA debt and remain a viable rural water service provider is substantially threatened.

Mississippi Rural Water Association ***("MRWA")*** is a nonprofit association comprised of rural water utilities formed for the purpose of advancing the interests of these utilities in providing water to residents of Mississippi. MRWA presently has 797 active member utilities who serve approximately 806,352 customers throughout the state of Mississippi. Most of MRWA's members have financed their operations through FmHA loans and grants. Many MRWA members have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. In the event Section 1926(b) protection is denied to these program participants substantial losses to MRWA members are likely.

Oklahoma Rural Water Association ***("ORWA")*** is a nonprofit association comprised of rural water utilities formed for the purpose of advancing the interests of these utilities in providing water to residents of Oklahoma. ORWA presently has 430 active member utilities who serve over 600,000 customers throughout the state of Oklahoma. Most of ORWA's members have financed their operations through FmHA loans and grants. Two Hundred and

Twelve (212) ORWA members have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. In the event Section 1926(b) protection is denied to these program participants losses to these ORWA members in excess of Eighty Million Dollars ($80,000,000.00) could result.

North Carolina Rural Water Association ***("NCRWA")*** is a nonprofit association comprised of rural water utilities formed for the purpose of advancing the interests of these utilities in providing water to residents of North Carolina. NCRWA presently has 455 active member utilities who serve approximately 913,360 customers throughout the state of North Carolina. Most of NCRWA's members have financed their operations through FmHA loans and grants. Many NCRWA members, such as fellow amicus Bell Arthur and Eastern Pines, have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. Potential losses to NCRWA members in the event Section 1926(b) protection is denied to these program participants could exceed Fifty Million Dollars ($50,000,000.00).

This is a case of first impression in the federal courts. The issues presented in this suit are critical to rural water utility providers nationwide, and directly affect hundreds of thousands of households who rely on these entities to provide low cost water service. These rural water utility providers rely on Section 1926(b) protection to maintain their customer base and the financial viability of their operations. By holding that Section 1926(b) protection does not extend to Section 1001(f) purchase program participants, the Sixth Circuit has directly contradicted the

opinion of the Colorado Supreme Court in the Ute case. *See*, City of Grand Junction v. Ute Water Conservacy District, 900 P.2d 81 (Colo. 1995). The Sixth Circuit decision severely jeopardizes the ability of these purchase program participants to repay their debt and to remain financially viable as rural water suppliers. The importance of the issues presented in this case to water utilities nationwide cannot be overemphasized. It is for this reason that the forenamed amicus submit this brief in support of Petitioner Scioto County Regional Water Dist. No. 1, Authority's Petition for Writ of Certiorari.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's opinion directly conflicts with the Colorado Supreme Court's ruling in City of Grand Junction v. Ute Water Conservacy District, 900 P.2d 81 (Colo. 1995).

The decision below is in direct conflict with the decision of the Colorado Supreme Court in Ute.

Amici maintain that the analysis underlying the Sixth Circuit's opinion is flawed and directly contradicts the decision in Ute, the only other case which has considered the applicability of Section 1926(b) to Section 1001(f) purchase program participants.

7 U.S.C. §1926(b) is part of a comprehensive federal program to provide FmHA loans to rural water providers in furtherance of a national policy to insure the availability of water to residents of rural areas. The legislative history of the statute indicates two Congressional purposes for its

enactment. 1) To encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns. North Alamo, 90 F.3d at 96; Bear Creek, 816 F.2d at 1059. As noted first in Bear Creek, and most recently in North Alamo, Congress' intent to protect territories of providers of rural water services against competitive services by municipalities and other public bodies is clearly evidenced by the Legislative history of the Statute:

> "This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system." S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

North Alamo at 96; Bear Creek at 1060.

Rural water providers require and rely on Section

1926(b) to maintain their customer base and ensure their continued financial viability so that they can provide water service at the lowest per user cost possible. Without the protection of Section 1926(b), municipalities bordering the service area of these rural water utilities would be allowed to encroach on these service areas and deprive the rural water provider of those portions of its service area with the greatest concentration of customers and those areas where the greatest potential for future growth lies. As a result of such encroachment the rural water provider is deprived of large portions of its customer base and a substantial portion of its revenues, ultimately resulting in substantially increased water rates to its remaining customers and quite possibly bankruptcy. It is the viability of these water service providers which Congress sought to protect by enactment of Section 1926(b). Whenever Section 1926(b) protection is limited, or as in this case denied, to a rural water service provider, the very existence of the rural water utility is threatened and Congress' legislative scheme to ensure the availability of water service to rural areas is undermined.

All of the federal courts that have interpreted Section 1926(b) have agreed that the statute should be construed broadly to prevent municipal encroachment on a rural water association's service area by means of annexation or grant of a private franchise. North Shelby Water Company v. Shelbyville Municipal Water and Sewer Commission, 803 F.Supp., 15, 21 (E.D.Ky. 1992); *See also*, Jennings Water, Inc. v. City of North Vernon, Ind., 682 F. Supp. 421, 425 (S.D. Inc. 1988), aff'd, 895 F.2d 311 (7th Cir. 1989)("The statute is unequivocal -- it prohibits any curtailment or limitation of the service provided by a rural association by municipal expansion"); Bear Creek at 1059; North Alamo at 96.

The Subdivision (g) amendment to OBRA expressly extended the protection of 7 U.S.C. § 1926(b) to all notes and other obligations "sold or intended to be sold" under Section 1001 of OBRA 1986, as amended. There is no language in the statute which denies Section 1926(b) protection to borrowers who purchase their notes and bonds under the purchase programs contemplated and implemented under subdivision (f).

The decision below is in direct conflict with the Colorado Supreme Court's decision in Ute. The court in the Ute case, held that Section 1926(b) protection extended to a water district who reacquired its bond from the FmHA under the Section 1001(f) purchase program. The Colorado Supreme Court primarily based its decision on settled principles of statutory construction and an examination of the comprehensive scheme which Congress has enacted to protect rural water districts. The court noted:

> "The fact that Congress provided for a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that *Congress intended to allow an issuer to reacquire its bond or note without losing the protection provided under Section 1926(b).*"(emphasis added).

Ute at 92.

The decision below relies heavily on common law rules regarding the extinguishment of debt and incorrectly attributes the decision of the Court in Ute to Colorado state law. A reading of the Ute case demonstrates that the Colorado Supreme Court did not base its' decision on

Colorado state law as asserted by the Sixth Circuit. The Colorado Supreme Court only cited Colorado state law as additional, not controlling, support for its decision.

Unlike the court in Ute, the decision below completely ignored the unambiguous and clear wording of OBRA, as amended by ACA, as well as one of the fundamental purposes underlying the entire FmHA loan program: to safeguard the viability and financial security of such associations by protecting them from the expansion of nearby cities and towns. North Alamo, 90 F.3d at 96; Bear Creek, 816 F.2d 1057, 1059. The Sixth Circuit completely overlooked the fact that the protections afforded by Section 1926(b) are intended to benefit not only the FmHA but also the rural water provider and its rural water member/customers.

These FmHA loan programs are part of a congressional scheme to subsidize rural water authorities so as to encourage rural water development. Bear Creek at 1061. Enactment of ACA 1987 was Congress' effort to effect meaningful reform of the agricultural credit sector, including FmHA lending. The intent of its provisions was to protect borrowers, such as Scioto County Regional Water District No. 1, Authority ***("Water 1")***, not penalize them.

The Ute decision presents the better reasoned approach. The conflict between its ruling and the decision of the court below is clear and irreconcilable. To allow the conflict in these decisions to stand will invite piecemeal litigation of this issue, resulting in increased costs of litigation to rural water providers, the very danger warned against by the Fifth Circuit in Bear Creek where the court, with particular emphasis on the burden and costs of making factual determinations, enunciated a bright-line rule

regarding the applicability of Section 1926(b). *See*, Bear Creek at 1059.

Amicus are aware of two other pending suits involving this issue and given that at least a thousand other entities participated in the Section 1001(f) purchase program, many more cases are certain to follow. Eg. Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D.IA.); Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2).

The thousands of entities and their customers likely to be affected by conflicting authority on this issue require guidance from this Court and a well reasoned decision determining the law on this issue. The importance of this issue to these many persons should weigh heavily in favor of this Court granting the Petition for Writ of Certiorari.

II. The Sixth Circuit's Opinion Is Contrary to the Court's Settled Principles of Statutory Construction.

A plain reading of OBRA, as amended by ACA, as well as the application of well settled rules of statutory construction argues in favor of extending Section 1926(b) protection to the Water 1 bond purchase transaction.

OBRA, as amended by ACA, subsection(g) provides as follows: "7 U.S.C. §1926(b).... shall be applicable to all notes or other obligations sold or intended to be sold under Section 1001 of the Omnibus Reconciliation Act of 1986."

The resolution of an issue of federal statutory construction begins with an analysis of the language of the statute itself, and absent a clearly expressed legislative

intention to the contrary, the plain language of the statute controls its construction. In every case involving the interpretation of a federal statute, the analysis must begin with the language employed by Congress. Howe v. Smith, 452 U.S. 473 (1981). In a statutory construction case, the beginning point must be the language of the statute, and when the statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but most extraordinary circumstances, is finished. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 112 S.Ct. 2589 (1992). It should be assumed that the ordinary meaning of the language used by Congress accurately expresses the legislative purpose. ParknFly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 662 (1985). Courts should disfavor interpretations of statutes that render language superfluous. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149 (1992)("Congress says in a statute what it means and means in a statute what it says there.")

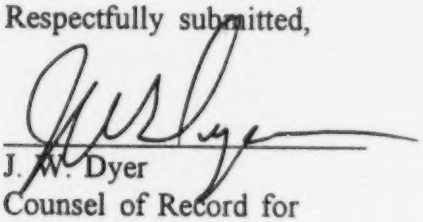
OBRA, as amended by ACA, clearly speaks in terms of all notes..."sold or intended to be sold" under Section 1001. The plain meaning of the statute directs that the protection of 7 U.S.C. §1926(b) extend to all notes selected by the Secretary to be sold, regardless of whether a sale is actually completed to a third party purchaser or the FmHA borrower/purchaser. To rule that the intent of Congress was to extend such protection only to obligations actually "sold" to third party purchasers would be to render the phrase "intended to be sold" superfluous and a nullity.

The decision below completely ignores these settled rules of statutory construction and warrants review by the Court. Certiorari is appropriate under these circumstances.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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